



12-04-2001

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #71

TTAB

Trademark Serial No.: 75/746,284  
Attorney Docket No.: 021775-086

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Trademark Application of

Proxim, Inc.

Serial No.: 75/746,284

Filed: July 8, 1999

Mark: HARMONY

Box: TTAB FEE

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NOTICE OF APPEAL

To The Trademark Trial and Appeal Board:

Applicant hereby appeals to the Trademark Trial and Appeal Board from the decision of the Examiner of Trademarks refusing registration.

Enclosed is our check in the amount of \$100.00 covering the appeal filing fee. Any deficiency in this amount should be charged to our Deposit Account No. 02-4800.

Respectfully submitted,  
Proxim, Inc.

12/07/2001 GTHOMAS2 00000008 75746284

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By

Robert E. Krebs  
Hoang-chi Truong  
Attorneys for Applicant

Burns, Doane, Swecker & Mathis, LLP  
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Alexandria, Virginia 22313-1404  
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Date: December 4, 2001

Trademark Application No.: 75/746,284  
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**REQUEST TO SUSPEND APPEAL AND**  
**REMAND APPLICATION FOR FURTHER EXAMINATION**

To the Trademark Trial and Appeal Board:

Applicant respectfully requests, pursuant to 37 C.F.R. § 2.142(d), that the appeal proceedings filed in connection with the above-identified application be suspended and the application remanded to the Examining Attorney for further examination.

Applicant is filing a Request for Reconsideration and Notice of Appeal concurrently with this request for suspension and remand. Upon consideration by the Examining Attorney, the Request for Reconsideration may secure removal of the final refusal that is the subject of the appeal and, thereby, moot this appeal. Thus, suspension of the appeal is respectfully requested along with remand of the file to the Examining Attorney for further reconsideration.


If the Board should deny this request for suspension and remand, then applicant respectfully requests that the Board set a new appeal brief due date that is a reasonable time subsequent to its decision on this request.

Trademark Application No.: 75/746,284  
Attorney Docket No.: 021775-086

Please feel free to contact the undersigned attorneys if there are any questions.

Respectfully submitted,

Proxim, Inc.

By   
Robert E. Krebs  
Hoang-chi Truong  
Attorneys for Applicant

Burns, Doane, Swecker & Mathis, L.L.P.  
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Trademark Application No.: 75/746,284

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of

Proxim, Inc.

Serial No.: 75/746,284

Filed: July 8, 1999

Mark: HARMONY

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: Trademark Attorney: Stacy B. Wahlberg  
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: Law Office: 113  
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: Box: Responses: NO FEE  
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**REQUEST FOR RECONSIDERATION**

Honorable Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

Sir:

This is in reply to the final Office Action of June 4, 2001, in the above-identified application.

In the application, please amend the identification of goods to the following:

-- Wireless networking system of products, namely, modems, PC adaptors, gateways, access bridges and related operating and driver software for sharing computing resources and access to a global computer information network and access to a local computer network, in International Class 9. --

**REMARKS**

Reconsideration of this application is respectfully requested. These remarks are directed to the issues raised in the final Office Action and follow that same order.

Likelihood of Confusion Refusal

The Examining Attorney has maintained her refusal to register applicant's mark based on U.S. Registration 2,368,383 for HARMONI. Applicant respectfully traverses the Examining Attorney's refusal to register its mark and, as discussed below, notes that its mark and the registered mark are distinguishable.

Even though both marks at issue are phonetically similar, this fact alone is not dispositive of a likelihood of confusion. "*Per se*" rules relating to likelihood of confusion have been struck down as being too inflexible as contrary to trademark law, where each case must be decided based on its own facts and circumstances. See In re Quadram Corp., 228 U.S.P.Q. 863, 865 (TTAB 1985); In re Sydel Lingerie Co., Inc., 197 U.S.P.Q. 629 (TTAB 1977) and cases cited therein. It is quite possible for no likelihood of confusion to exist even between marks which may appear to be identical in the abstract where the respective goods or services are such that prospective consumers are not likely to assume that those services share a common source. In this case, differences in the marks and goods, the purpose of the goods and the sophistication of the prospective buyers make confusion unlikely.

First, in testing for likelihood of confusion, the similarity or dissimilarity of the marks as to appearance, sound, connotation and commercial impression must be viewed in their entirety. Applicant seeks to register the mark HARMONY whereas the registered mark is HARMONI. The marks are visually different and such difference would be readily noticed by the discerning consumers of the respective products. The differences do not end there, however, as may be seen from the attached product information sheet relating to the goods of the citation.

It should be noted that the registrant's mark is an acronym for "Hierarchical Autonomous Remote Monitoring Instrument," as evidenced by registrant's product information sheet. Moreover, registrant's use of the mark as "HaRMONi" accentuates the acronym "RMON," which means "remote monitoring." Remote monitoring is a standard monitoring

specification that enables various network monitors and console systems to exchange network-monitoring data and, accordingly, provides network administrators with more freedom in selecting networking-monitoring probes and consoles with features that meet their particular networking needs. These embedded meanings will be obvious to the knowledgeable purchasers of the goods, and influence the meaning and commercial impression conveyed by this mark to the relevant consumers. Applicant's mark does not convey any similar message since its products are not RMON, i.e., remote monitoring, products.

Aside from creating a different meaning and commercial impression from applicant's HARMONY mark, the use of "RMON" in the HARMONI mark makes the registered mark highly suggestive, if not descriptive or generic, of the goods of the cited registration. Such highly suggestive marks are generally accorded a limited scope of protection. See, e.g., Stouffer Corp. v. Health Valley Natural Foods, Inc., 1 U.S.P.Q. 2d 1900 (TTAB 1986) and EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc., 217 U.S.P.Q. 986 (Fed. Cir. 1983).

The differences in the marks are even more significant when considered along with the nature of and differences in the respective goods. Applicant's goods comprise a wireless networking system of products for sharing computer resources and access to the Internet and Intranet, whereas the registrant's goods are diagnostic software. These are different products used for different purposes. The non-competitive nature of the products is also a relevant factor in determining likelihood of confusion between the marks. See Curtice-Burns, Inc. v. Northwest Sanitation Products, Inc., 197 U.S.P.Q. 629 (TTAB 1977).

Simply because the marks at issue cover goods that can be broadly grouped as computer software does not support a finding of likelihood of confusion. Use in the same broad field is not sufficient to demonstrate that a genuine issue exists concerning likelihood of confusion, especially where computers are involved. The Board has long recognized that a finding of likelihood of confusion should not automatically follow in all cases where the goods or services in question involve computer software and/or hardware.

As a result of the veritable explosion of technology in the computer field over the past several years and the almost limitless number of specialized products and specialized uses in this industry, we think that a per se rule relating to source confusion vis-a-vis computer hardware and software is simply too rigid and restrictive an approach and fails to consider the realities of the marketplace.

Information Resources, Inc. v. X\*Press Information Services, 6 U.S.P.Q. 2d 1034, 1038 (TTAB 1988) (quoting In re Quadram Corp., 228 U.S.P.Q. 863 (TTAB 1985)). See also Astra Pharmaceutical Products v. Beckman Instruments, 220 U.S.P.Q. 786, 790 (1st Cir. 1983).

Here, even if the respective products were purchased for use in connection with a single business, they would be purchased for different purposes and likely at different times by different individuals within the organization. The information technology field has become quite departmentalized for effective dealing with the broad range of problems from, e.g., those of the end-user of a laptop on the one hand, to the smooth operation of the network on the other hand.

Furthermore, in determining whether there is a likelihood of confusion, everything hinges on whether there is a probability that confusion will arise in the minds of an appreciable number of reasonably prudent buyers. Standard Brands, Inc. v. Smidler, 151 F.2d 34 (2d Cir. 1945). A reasonably prudent purchaser is expected to exercise the degree of care and caution appropriate to the choice the purchaser faces in the market place. Volkswagen Aktiengesellschaft v. Church, 411 F.2d 350 (9<sup>th</sup> Cir. 1969). Thus, the reasonably prudent buyer is not indifferent, foolish or negligent.

Where the relevant buyer class is composed of purchasers making important buying decisions, it is reasonable to set a higher standard of care than exists for consumers making casual purchases. In other words, it is assumed that such buyers are less likely to be confused than the ordinary consumer and, while two marks might be sufficiently similar to confuse an impulse buyer, an attentive buyer or expert in the field may be more knowledgeable and

careful and will not be confused. McCarthy on Trademarks, Section 23:101. See also Astra Pharmaceutical Products v. Beckman Instruments, 220 U.S.P.Q. 786, 790 (1st Cir. 1983) and Hewlett-Packard Co. v. Human Performance Measurement Inc., 23 U.S.P.Q. 2d 1390 (TTAB 1991).

The buyers of the goods in question are highly sophisticated individuals who are charged with finding solutions to specific technology needs. Such consumers know that software serves different purposes. Applicant's product is purchased for a particular purpose and much attention must be directed to the product specifications in determining the appropriateness of the product to meet the needs of the consumer. A purchase of this type would never result from a hasty decision made merely upon seeing a name. Rather, the decision to purchase applicant's product is made by a discriminating purchaser, well informed in the area, only after careful consideration of the product. This same discrimination will also be exercised by the purchasers of registrant's goods, which are specialized products in their own rights. Where all parties involved exercise such care, the possibility of confusion is eliminated.

In conclusion, applicant submits that it has distinguished its application from the cited registration and respectfully requests that the Examining Attorney withdraw the citation from its application.

#### Identification of Goods

Applicant has amended the identification of goods and submits that the identification is now definite and acceptable.

#### CONCLUSION

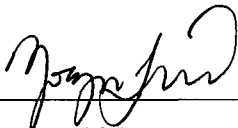
Applicant respectfully requests that the Examining Attorney withdraw the cited registration against its application. Further and favorable action is respectfully requested.



Trademark Application No.: 75/746,284  
Attorney Docket No.: 021775-086

If a telephone conversation could expedite the prosecution of this application, the  
Examining Attorney is requested to call the undersigned attorneys.

Respectfully submitted,

By:   
Hoang-chi Truong  
Robert E. Krebs  
Attorneys for Applicant

Date: December 4, 2001

Burns, Doane, Swecker & Mathis, L.L.P.  
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**HaRMONi is the world's first fully programmable, secure RMON-II agent. This latest technology from NDG Software, world leaders in network monitoring and management tools, is a dramatic improvement on existing software agents. It is set to revolutionize the world of remote monitoring.**

## H

### *Hierarchical*

HaRMONi is the first RMON-II agent of its kind to feature complete programmability and PKI security.

The agent provides all the functionality of standard RMON-II agents with the addition of an open-standard programmable MIB and a *virtual machine*. This dramatically expands the capabilities of standard RMON-II network management, resulting in reduced overhead, distributed intelligence and an increased level of fault tolerance.

## A

### *Autonomous*

Specifically, the mechanism that allows HaRMONi to run general-purpose programs either manually via an NMS, or automatically via the RMON alarm group, will continue to run even after a fault occurs in the system. By running general-purpose programs from RMON, it is possible to calculate and store value-added data in local MIBs for retrieval at a later date.

The first agent to allow enterprise management to be incorporated into the existing network management framework, HaRMONi also serves as a desktop-based RMON-II agent. It may be programmed to perform *both* enterprise and network tasks. This allows existing NMS solutions to conduct enterprise management, using existing open systems standards such as SNMP, RMON and TCP/IP, as well as

## R MON

### *Remote Monitoring*

standard programming languages like Perl, JAVA and TCL/TK.

HaRMONi's programmability allows the network manager to construct a customized application within the RMON framework. This is done by writing programs in an interpreted language that can be stored and distributed like any other piece of RMON data, effectively removing the restrictions of current network management systems where the functionality and structure of network management information are traditionally hard-wired.

A powerful and flexible agent, HaRMONi provides a cost effective solution for corporations who need to monitor and manage many desktops. It reduces network traffic bottlenecks by removing the necessity to transfer raw data to the NMS because HaRMONi stores this data. It also allows for offline operation as it requires no intervention from the NMS to activate a program.

*HaRMONi installs on any Windows PC or Server and provides full RMON-II network monitoring for both Ethernet and Token Ring networks. HaRMONi does not require a dedicated PC or dedicated network interface card.*

Specifications are subject to change without notice.  
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**Documentation**

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#### Background RMON Groups

## Remote Monitoring (RMON)

### Background

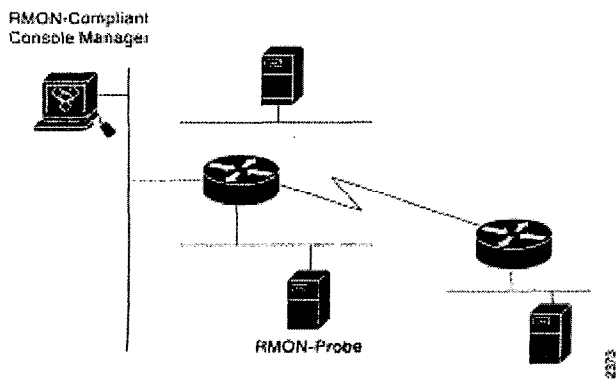
Remote Monitoring (*RMON*) is a standard monitoring specification that enables various network monitors and console systems to exchange network-monitoring data. RMON provides network administrators with more freedom in selecting network-monitoring probes and consoles with features that meet their particular networking needs. This chapter provides a brief overview of the RMON specification, focusing on RMON groups.

The RMON specification defines a set of statistics and functions that can be exchanged between RMON-compliant console managers and network probes. As such, RMON provides network administrators with comprehensive network-fault diagnosis, planning, and performance-tuning information.

RMON was defined by the user community with the help of the Internet Engineering Task Force (IETF). It became a proposed standard in 1992 as RFC 1271 (for Ethernet). RMON then became a draft standard in 1995 as RFC 1757, effectively obsoleting RFC 1271.

Figure 51-1 illustrates an RMON probe capable of monitoring an Ethernet segment and transmitting statistical information back to an RMON-compliant console.

**Figure 51-1: An RMON probe can send statistical information to an RMON console.**



## RMON Groups

RMON delivers information in nine *RMON groups* of monitoring elements, each providing specific sets of data to meet common network-monitoring requirements. Each group is optional so that vendors do not need to support all the groups within the Management Information Base (MIB). Some RMON groups require support of other RMON groups to function properly. Table 51-1 summarizes the nine monitoring groups specified in the RFC 1757 Ethernet RMON MIB.

**Table 51-1: RMON Monitoring Groups**

RMON Group	Function	Elements
Statistics	Contains statistics measured by the probe for each monitored interface on this device.	Packets dropped, packets sent, bytes sent (octets), broadcast packets, multicast packets, CRC errors, runs, giants, fragments, jabbers, collisions, and counters for packets ranging from 64-128, 128-256, 256-512, 512-1024, and 1024-1518 bytes.
History	Records periodic statistical samples from a network and stores them for later retrieval.	Sample period, number of samples, item(s) sampled.
Alarm	Periodically takes statistical samples from variables in the probe and compares them with previously configured thresholds. If the monitored variable crosses a threshold, an event is generated.	Includes the alarm table and requires the implementation of the event group. Alarm type, interval, starting threshold, stop threshold.
Host	Contains statistics associated with each host discovered on the network.	Host address, packets, and bytes received and transmitted, as well as broadcast, multicast, and error packets.
HostTopN	Prepares tables that describe the hosts that top a list ordered by one of their statistics. The available statistics are samples of one of their base statistics over an interval specified by the management station. Thus, these statistics are rate-based.	Statistics, host(s), sample start and stop periods, rate base, duration.
Matrix	Stores statistics for conversations between sets of two addresses. As the device detects a new conversation, it creates a new entry in its table.	Source and destination address pairs and packets, bytes, and errors for each pair.
Filters	Enables packets to be matched by a filter equation. These matched packets form a data stream that might be captured or might generate events.	Bit-filter type (mask or not mask), filter expression (bit level), conditional expression (and, or, not) to other filters.
Packet Capture	Enables packets to be captured after they flow through a channel.	Size of buffer for captured packets, full status (alarm), number of captured packets.
Events	Controls the generation and notification of events from this device.	Event type, description, last time event sent.

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